SUPREME COURT, U.S.

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IN THE

# Supreme Court of the United States

October Term, 1963.

No. 428

CITIZENS UTILITIES COMPANY,

*Petitioner,*

—v.—

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THE THIRD NATIONAL BANK AND TRUST COMPANY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CITIZENS UTILITIES COMPANY,

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—v.—

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THE THIRD NATIONAL BANK AND TRUST COMPANY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Citizens Utilities Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 24, 1963.

### Citations to Opinions Below

By a 2 to 1 decision (unreported at this date) (Hays, *J.*, dissenting) which appears as "Appendix A" to this Petition, the Circuit Court of Appeals affirmed* the judgment of the United States District Court for the District of Ver-

* The judgment of the District Court was modified in certain respects irrelevant to this Petition.

mont which had ordered specific performance of a contract for the purchase of land, based on its interpretation of the preemptive effect of the Federal Power Act. The opinion of the District Court thus affirmed appears in the "Appendix to Defendant-Appellant's Main Brief" in the Circuit Court (hereinafter designated as "R.") at page 149a, and is reported at 209 F. Supp. 26. An earlier opinion of the District Court in this case, appearing in "Appendix B" to this Petition and reported at 150 F. Supp. 892, was reversed by the United States Court of Appeals for the Second Circuit in an opinion printed at R. 138a, and reported at 257 F. 2d 692, *cert. denied;* 358 U. S. 867.

In companion proceedings, an opinion was handed down by the Vermont Public Service Commission which is printed at R. 46a; the Supreme Court of the State of Vermont reversed the Vermont Public Service Commission in an opinion printed at R. 119a and reported at 122 Vt. 443, 176 A. 2d 751, *cert. denied;* 369 U. S. 838. Pertinent portions of the opinion and order of the Federal Power Commission are printed at R. 37a, and the entire opinion is reported at 27 P. U. R. 3d 183; the opinion of the Court of Appeals for the Second Circuit affirming the Federal Power Commission appears in "Appendix B" to this Petition and is reported at 279 F. 2d 1, *cert. denied;* 364 U. S. 893.

## Jurisdiction

The judgment of the Circuit Court, which appears as "Appendix C" to this Petition, was entered on June 24, 1963. Rehearing was denied on July 17, 1963. The jurisdiction of this Court is invoked under 28 USCA §1254(1).

## Questions Presented

1. Does the Federal Power Act require that whenever the Federal Power Commission makes a determination as to the navigability or partial navigability of a waterway of the United States, such determination must have the following consequential impact on a state's power of eminent domain over land needed by a public utility abutting such waterway:

(a) That a state regulatory agency's previously existing condemnation jurisdiction is *retroactively* preempted by the Federal Power Act, so as to nullify contracts made, or other actions taken in good faith reliance thereon, even though a penalty or forfeiture is thereby imposed on a public utility; or

(b) That a state regulatory agency must be deemed never to have had any condemnation jurisdiction in respect of such land even prior to the Federal Power Commission's assumption of jurisdiction or commencement of investigation of the question of navigability, with the effect that actions taken by such agency and any rights of a utility deriving therefrom, must *retroactively* be deemed null and void once the Federal Power Commission makes its determination that a waterway is navigable.

2. Can a federal court, sitting in a diversity case and purporting to apply state law, hold that, by virtue of the state courts' interpretation of the Federal Power Act, a state regulatory agency must be deemed never to have had jurisdiction to condemn land, in the face of a clear pronouncement by the highest court of the forum state (even by way of dictum) that this jurisdiction *was* once present but has been subsequently ousted?

3. Was Judge Hays (dissenting in the Circuit Court) correct in his view that the Vermont Public Service Commission was an appropriate body before which to bring a condemnation proceeding, within the intendment of the language of the contract here in question, and that the majority had construed the contract with a strictness violative of the intent of the contracting parties?

## Statutes Involved

The statutory provisions involved herein are Section 23 of the Federal Power Act, 16 USCA §817, which is printed at R. 142a; Section 27 of the Federal Power Act, 16 USCA §821, which appears in "Appendix B" to this Petition; and Sections 9331-9333 of the Vermont Statutes, which are printed at R. 143a.

## Statement

The district court, which obtained jurisdiction solely through diversity of citizenship, was of opinion that the Federal Power Act compelled a holding that the Vermont Public Service Commission *never* had condemnation jurisdiction in respect of land located along the Clyde River because the Federal Power Commission determined that the river was a navigable waterway. The district judge interpreted the prior holding of the Vermont Supreme Court in a companion action,* to the effect that the Public Service Commission's condemnation jurisdiction was "ousted" *subsequent* to assumption of jurisdiction by the Federal Power Commission, as meaning that no such jurisdiction had ever previously existed, stating (at 209 F. Supp. pp. 29-30):

* Reported at 122 Vt. 433, 176 A. 2d 75; R. 119a.

> "If jurisdiction does not exist over the subject matter in a particular court or tribunal, it never existed, and there is nothing to be lost or ousted. Therefore when the Vermont Supreme Court states that the Vermont Public Service Commission did not have jurisdiction of the subject matter now in controversy, it is declaring that jurisdiction over this matter never existed in the Vermont Public Service Commission. The Clyde River is navigable water, and the Federal Power Commission has had exclusive jurisdiction over it, certainly since the creation of the Federal Power Commission."

The Circuit Court, in affirming the court below, expressed some disagreement with the lower court's view "that a present lack of jurisdiction *requires* a finding that jurisdiction has always been absent." (Emphasis added.) (Appendix A, p. 5a). Nevertheless, it reached the same conclusion as the district court after similarly purporting to construe the Federal Power Act in the same manner as the Vermont Supreme Court would supposedly have done. Thus, after examining the question of the Vermont Public Service Commission's jurisdiction, *de novo*, the Circuit Court concluded that the Vermont Supreme Court's statement that the jurisdiction of the Vermont Public Service Commission was *ousted* (R. 130a) should be disregarded (Appendix A, p. 5a). It went on to hold that the Federal Power Act, as supposedly construed in an earlier Vermont decision,* compelled a finding "that Federal legislation had preempted the field and that the Commission had no jurisdiction to act" . . . "*even in the absence of any federal action.*" (Appendix A, p. 6a) (Emphasis added.)

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* *In Re Bellows Falls Hydroelectric Corp.*, 114 Vt. 443, 47 A. 2d 409 (1946).

## The Facts

The foregoing judicial interpretation of the Federal Power Act's effect on the jurisdiction of a state agency arose in the following factual context:

On March 27, 1956, Citizens Utilities Company (hereinafter "Citizens") filed its petition for condemnation of certain lands of the instant respondents, situated along the Clyde River in Orleans County, Vermont. These lands are located between a dam and a generating station which have been maintained and operated by Citizens for many years.

For 25 years prior to October 1, 1955, Citizens and its predecessors occupied respondents' lands as tenants under a written lease which provided that the lessee could acquire title to the property prior to October 1, 1955 for the sum of $150,000. In the event that the property was not acquired pursuant to that option, it was provided that within six months after October 1, 1955, the termination date of the lease, the lessee would purchase and the owner would sell the property at a mutually satisfactory price, or, if the parties could not agree upon a price, acquisition of the land was to result from the lessee's institution of proceedings to acquire the property by condemnation, "such proceedings to be instituted before the tribunal *then having jurisdiction of such proceedings*. . . ." (Emphasis added.) The lease further provided that if the lessee did not institute such condemnation proceedings within six months following October 1, 1955, the price for the property was fixed at $300,000.*

* In *1959*, the Vermont Public Service Commission, after hearings, found the fair value of the property to be $95,000 (R. 69a). It would appear, on its face, that the $300,000 value figure established 30 years before, in 1930, could only have been intended as a penal provision, possibly designed to compel speedy institution of condemnation proceedings after the expiration of the lease.

Citizens concededly filed its petition in condemnation with the Vermont Public Service Commission within the required six-month period following the termination of the lease on October 1, 1955 (R. 48a).

Shortly after filing of the petition, respondents herein interposed a so-called "plea to the jurisdiction" (R. 48a) before the Vermont Public Service Commission. By such plea, respondents urged that the Commission had no jurisdiction in the condemnation proceedings because the Clyde River was navigable waters of the United States and Citizens had not obtained a license from the Federal Power Commission for the maintenance and operation of its facilities thereon, notwithstanding that prior to this time the Federal Power Commission had never asserted nor attempted to impose its jurisdiction on any portion of the Clyde River or Citizens' facilities.

On May 11, 1956, before any ruling from the Vermont Public Service Commission on their "plea to the jurisdiction," respondents commenced the instant action against Citizens in the United States District Court for the District of Vermont. The District Court was asked to declare, in advance of any other adjudication, that the Clyde River was navigable waters of the United States; that Citizens was required to have a license from the Federal Power Commission in order to maintain its facilities thereon; and that the Public Service Commission was on that account ousted of jurisdiction over Citizens' petition for condemnation. The relief sought in the Complaint herein was an injunction against further proceedings by the Vermont Public Service Commission in the condemnation proceeding, and a decree of specific performance in respect of the *penal provision* of the lease agreement, whereunder Citizens was to pay respondents $300,000 for the property.

The District Court initially directed entry of judgment for specific performance in favor of respondents and against

Citizens (150 F. Supp. 892). On appeal from that decision to the United States Court of Appeals for the Second Circuit, the decree of the District Court was reversed. (257 F. 2d 692, *cert. denied* 358 U. S. 867); the Circuit Court held that it was error for the District Court to have interfered with the Public Service Commission's *in rem* jurisdiction over the property in the condemnation proceeding and further concluded that the Public Service Commission had a right to determine for itself any jurisdictional objections without interference from the federal court.

While proceedings were going forward in the district court action and on the appeals from the decree therein, the Vermont Public Service Commission took no action on Citizens' petition for condemnation. Not until after respondents' petition for certiorari to the United States Supreme Court had been denied did the Commission proceed with the condemnation action.

In June of 1957, over two years after institution of Citizens' condemnation proceeding, the Federal Power Commission instituted a proceeding to determine whether the Clyde River was navigable waters within the meaning of the Federal Power Act. In August 1958, the Chief Presiding Examiner of the Federal Power Commission held that only a limited portion of the stream was navigable (such portion not including any of the stream adjacent to the lands here in question) but nevertheless concluded that a portion of certain of Citizens' facilities on the stream affected the interest of interstate or foreign commerce in the first mile section of the stream (such portion not including any of the stream adjacent to respondents' lands) and directed that Citizens apply for a license for such facilities. Early in 1959, the full Federal Power Commission handed down a decision holding that the entire Clyde River was navigable. Thereupon Citizens appealed from the Com-

mission's Order to the United States Court of Appeals for the Second Circuit. That Court made a decision of *limited affirmance* of the Commission's Order (279 F. 2d 1), holding only that the first mile of the Clyde River from its mouth was navigable waters of the United States, and that certain of Citizens' facilities on the stream affected the interests of interstate or foreign commerce *in that first mile section.* The Court expressly reserved the question of the navigability of the Clyde River as a whole.

On June 12, 1959, the Vermont Public Service Commission overruled respondents' "plea to the jurisdiction." After holding that it had jurisdiction over the condemnation proceedings, the Commission granted Citizens condemnation of the lands and fixed compensation therefor in the sum of $95,000 (R. 69a).

On Appeal being taken to the Vermont Supreme Court from the decision of the Vermont Public Service Commission, it was held that the Commission had erred in ruling that it "retained jurisdiction" *subsequent* to the Federal Power Commission's assertion of jurisdiction over the project (R. 127a). Referring to the "change in both the factual and legal situation presented for its [the Vermont Commission's] consideration," * the Vermont Supreme Court went on to speak of the requirement of a Federal Power Commission license *newly* imposed on Citizens "[d]espite the fact that its project *might have been previously built under State authority* (R. 130a)." (Emphasis added.) In similar vein, the Vermont court set forth its view that once a federal agency, such as the Federal Power Commission, "assumes jurisdiction of a particular case after a

* The change to which the Vermont court had reference was, of course, the assertion of jurisdiction by the Federal Power Commission pursuant to its finding of navigability (R. 130a).

state board has *taken jurisdiction* thereof, the state board's jurisdiction is *ousted* (R. 130a)." (Emphasis added.)

Thereafter, the district court handed down the decision herein which, as modified and affirmed by the circuit court, is sought to be reviewed by the present Petition.

## Reasons for Granting the Writ

1. The interpretation placed on the Federal Power Act by the court below is of far-reaching import to the Act's administration. This case squarely poses—apparently for the first time—the question as to the existence and scope of a state's power of eminent domain over land abutting *possibly* navigable waters, *prior* to any determination of navigability by the Federal Power Commission.

Although this case arises in the setting of a contract dispute between private parties, the decision here sought to be reviewed represents a clear and widely applicable holding relating to the impact of the Federal Power Act on federal-state condemnation jurisdiction. The inescapable thrust of the decision is that the Vermont Public Service Commission's jurisdiction to condemn had been wholly preempted by the Act, for otherwise the Commission would have been the "tribunal then having jurisdiction" within the meaning of the contract, even if it were necessary to cure certain procedural defects (lack of license) before the Commission made a final adjudication in the course of exercising such jurisdiction.

Pursuant to the interpretation placed on the Act by the district and circuit courts below, a state condemning agency and a utility which has derived property rights therefrom, act completely at their peril. Under the *ratio* applied below, a determination of the Federal Power Commission, handed down *subsequent* to adjudications of the state agency,

has the effect of retroactively doing away with previously established rights, for the decision of the court below constitutes a square-holding that a state regulatory agency's *jurisdiction* is completely non-existent whenever there is a failure to satisfy the procedural requirements concerning licenses prescribed by the Federal Power Act. Such a holding of *jurisdictional disqualification*, it should be noted, goes far beyond a ruling that the state agency and utility deriving rights therefrom must *eventually* comply with these Federal Power Act licensing requirements. The reasoning of the decision below does not even permit the agency or utility to cure any procedural defects *after* a decision has been handed down by the agency, or after commencement of hearings by the agency; the agency's jurisdiction, according to the circuit court below, is *ab initio* preempted unless and until the federal procedural licensing requirements have *first* been met.

A ruling by this Court would eliminate the uncertainty concerning public utility property rights and the authority of state condemning agencies which the decision below may have engendered in innumerable cases where a Federal Power Commission adjudication has followed earlier condemnation decisions of a state agency.

2. It is submitted that the decision of the court below incorrectly interprets the Federal Power Act and conflicts with an applicable decision of this Court* in respect thereto (see p. 12, *infra*).

Section 23 of the Federal Power Act (R. 142a) prohibits the *construction*, *operation*, or *maintenance* of hydro-electric projects and adjuncts thereto on navigable waters without

* *Grand River Dam Authority* v. *Grand Hydro*, 335 U. S. 359 (1948).

a federal license; it places no prohibition on the *commencement* of condemnation proceedings looking towards *eventual* acquisition of land to be used for such purpose whether or not a federal license has been obtained in advance of instituting such proceedings.

The Act does not presume or purport to set up a strictly-ordered procedural eminent domain timetable which will be binding on the states; nor would there be any reason or purpose to reading such a timetable into the language of the Act. Section 27 of the Act (Appendix B, at p. 30a), which specifies that the Act is in no way intended to interfere with the laws of the respective states in respect of rights that have been vested in waterways, negates any such interpretation. So also does the decision of this Court in the *Grand River Dam* case, *supra*, which clearly indicates that the commencement of a condemnation proceeding under state auspices was *not* a void or ineffective act, notwithstanding that no federal license had been obtained in advance of its institution.

In the *Grand River Dam* case, which arose on facts analogous to the present case, a state condemnation proceeding had been commenced in February, 1939 (335 U. S., at p. 364), shortly *after* the Federal Power Authority had determined that the project for which the land was sought would affect navigable waters. No federal license was obtained *until six months later*, in July of 1939 (335 U. S., at p. 366). Notwithstanding this delay, no question was raised before or by the courts, nor, from anything that appears, before or by the state condemning agency, concerning the lack of a federal license. Moreover, notwithstanding that this so-called jurisdictional defect (as it was interpreted to be by the circuit court below) appeared on the face of the record, the condemnation award in the *Grand River Dam* case was

upheld by the state court and, subsequently, by the United States Supreme Court.

Accordingly, the teaching of the *Grand River Dam* case is clearly that the *initial* failure of a public utility to obtain a federal license does not constitute a barrier to *commencement* of state condemnation proceedings. If this conclusion be valid, there can be no question that the Vermont Public Service Commission had jurisdiction at the time Citizens *initiated* its condemnation action and the decision below must therefore be reversed.

3. The decision below also raises a significant federal procedural question concerning the weight that circuit and district courts, sitting in diversity cases, should accord to pronouncements by the highest court of the forum state which may not rise to the level of definitive decisional holdings.

Both the district and circuit courts below purported, in their decisions, to be applying Vermont law in determining the existence or non-existence of condemnation jurisdiction in the Vermont Public Service Commission *prior* to any assumption of jurisdiction by the Federal Power Commission. Nevertheless, the facts hereinabove set forth (*supra*, p. 9) make it clear that the Vermont Supreme Court was definitely of the view that the Vermont Public Service Commission did *once* have jurisdiction which was *subsequently* "ousted"; such opinion was ignored because of the circuit court's conclusion that "the Supreme Court of Vermont did not have the issue of initial jurisdiction before it . . ." (Appendix A, at p. 5a.)

The circuit court purported to rely, instead, on the *Bellows Falls* decision* as being indicative that the Vermont

* 114 Vt. 443, 47 A. 2d 409 (1946).

Supreme Court would hold the condemnation jurisdiction of the Public Service Commission to have been prospectively ousted by the Federal Power Act unless and until a federal license was obtained by a public utility.* However, the challenge to the Vermont Public Service Commission's jurisdiction in the *Bellows Falls* case arose only *after* the Federal Power Commission had assumed jurisdiction and had thereby (according to the Vermont Supreme Court) preempted the field. The Report of the Vermont Public Service Commission herein explicitly makes this distinction (R. 49a) and, in this respect, was not reversed by the subsequent opinion of the Supreme Court of Vermont (R. 119a).

Quite clearly, then, the circuit court's exclusive reliance on *Bellows Falls* was misplaced and the sole meaningful guide to the determination that the Vermont Supreme Court would have itself made herein is the decision of that court in the companion case (R. 119a) hereinabove referred to. Controlling federal decisions require that a federal court, sitting in a diversity case, must give due weight to *all* pronouncements by state tribunals, even if they be dicta. For example, in *Yoder* v. *Nu Enamel Corp.*, 117 F. 2d 488, 489 (8th Cir. 1941), this rule was stated as follows:

> "In the application of a state statute, the federal courts are, of course, bound by the construction made by the courts of the state. Senn v. Tile Layers Union, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229. And the obligation to accept local interpretation extends not merely to definitive decisions, but to considered dicta as well. Hawks v. Hamill, 288 U. S. 52, 53 S. Ct.

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* Applicable Vermont statutes (R. 143a) make no mention whatsoever of *when* the federal license must be obtained. Accordingly, the circuit court's *sole* support for its conclusion was the *Bellows Falls* decision.

240, 77 L. Ed. 610; Badger v. Hoidale, 8 Cir., 88 F. 2d 208, 109 A. L. R. 798. Indeed, under the implications of Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, and West v. American Telephone and Telegraph Co., 61 S. Ct. 179, 85 L. Ed. ——, where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from the related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed."

It is respectfully submitted that the circuit court below has violated this policy by failing to accord sufficient attention and weight to the statements by the Vermont Supreme Court (See p. 9, *supra*) which would clearly indicate its view that jurisdiction was present in the Vermont Public Service Commission until *subsequently* ousted by the Federal Power Commission's later determination of navigability.

4. If it is assumed that the circuit and district courts below were correct in their analysis of the *Bellows Falls decision*, so that the Federal Power Act would, in fact, be regarded as compelling the conclusion reached below under applicable Vermont law, it was then error not to have

considered controlling federal precedents, including the *Grand River Dam* case, *supra*, which require a contrary conclusion.

The *Grand River Dam* case is also squarely in point as regards the attempt here by the circuit and district courts to rest their decisions exclusively on purported state decisional grounds. It was specifically stated in *Grand River* (at pp. 369-70):

> ". . . the fact that the state court purported to rest its decision largely on state law does not eliminate our duty to consider the question to the extent that it arises under federal law [citing numerous cases]. Again, it is suggested that the Federal Power Act has superseded the state law and has set up a new standard of valuation binding upon the state even in a condemnation proceeding under state law. It is, of course, for us to examine whether questions of federal law were necessarily, although only impliedly, adjudicated by the state court."

As in *Grand River*, the presence of a federal question in this case stands out starkly, notwithstanding the interposition and purported reliance by the district and circuit courts on the supposed interpretation of the Federal Power Act set forth by the Vermont Supreme Court in its *Bellows Falls* decision.

5. The dissenting opinion in the circuit court claimed that the interpretation placed on the meaning of the word "jurisdiction" by the majority was, as a matter of contract law, overly formalistic and unwarranted (Appendix A, at p. 8a). To the extent that the Federal Power Act can be interpreted, as was done below, so as retroactively to preempt jurisdiction of a state agency, the dissent's view presents still another reason for granting this Petition.

It should also be noted, in this connection, that this narrowly restrictive contract interpretation has been imposed by the court below without any indication that the Vermont courts would have countenanced it. Furthermore, a forfeiture will thereby be imposed on a public utility with the necessary, consequent result that it will be passed on to countless consumer customers.

## CONCLUSION

**For the above reasons, petitioner prays that a Writ of Certiorari be granted.**

Respectfully submitted,

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## APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 310—October Term, 1962

(Argued April 29, 1963 Decided June 24, 1963)

Docket No. 27970

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CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY, and THE THIRD NATIONAL BANK AND TRUST COMPANY,

*Plaintiffs-Appellees,*

v.

CITIZENS UTILITIES COMPANY,

*Defendant-Appellant.*

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Before:

CLARK, SMITH and HAYS, *Circuit Judges.*

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MILTON S. GOULD, New York, N. Y. (Gallop, Climenko & Gould, New York, N. Y. and Clifton G. Parker, Morrisville, Vermont, on the brief) *for defendant-appellant.*

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KENNETH P. AKEY, Burlington, Vermont, *for appellee Elsinor Prouty Mallory.*

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SMITH, *Circuit Judge*:

The four plaintiffs are the heirs of Abbie D. Prouty who executed a lease of certain property to the Newport Electric Light Company, predecessor of the present defendant, in 1930. The leasehold was land on both sides of the Clyde River, a stream in northern Vermont. Most of the fall of that river, from its source to mouth, is concentrated on plaintiffs' property. At present, the Citizens Utility Company has erected and is maintaining penstocks (a type of conduit) bringing water from a dam upstream to generating facilities below. There is apparently no alternate route for the penstocks and they are a necessary part of defendant's hydroelectric development. The lease was for a twenty-five year term and provided a monthly rental and an option to purchase before October 1, 1935 for $150,000. In the event that the option was not exercised, as it was not, the lessee was required by the terms of the lease to purchase the property within six

months after its expiration either at a mutually agreed price, or for $300,000, or by instituting proceedings to acquire the property through condemnation "before the tribunal then having jurisdiction of such proceedings."

Apparently believing that the Vermont Public Service Commission was the proper body, defendant instituted condemnation proceedings before it to acquire the property on March 27, 1956. Plaintiffs countered by bringing this action on May 11, 1956—the six-month period had meanwhile expired on March 30, 1956. Plaintiffs claimed that the sole body having "jurisdiction" was the Federal Power Commission, arguing that the Clyde was a navigable stream under exclusive federal regulation. As Citizen Utility had never sought the federal license required by law (16 U. S. C. § 817) for its operations, the federal statutory provisions permitting a licensee to institute condemnation proceedings before an appropriate state tribunal (16 U. S. C. § 814) and the implementing Vermont legislation (30 Vt. Stats. Ann. §§ 109-115) were said to be inapplicable. The complaint asked injunction of further proceedings before the Vermont Public Service Commission and specific performance of the contract at the stated price of $300,000, now the only available alternative. Jurisdiction was based on diversity of citizenship: Citizen Utilities was a Delaware corporation and plaintiffs were citizens of other states.

The District Court held that the Clyde River was indeed navigable (pursuant to the verdict of an advisory jury), and that federal legislation had superseded state jurisdiction over navigable waters. The Court refused to grant the injunction, but concluded the defendant should have applied to the Federal Power Commission for a license to acquire the property in order to place its controversy before a tribunal having jurisdiction, and that the plaintiffs were therefore entitled to specific performance

of the agreement at the $300,000 sale price. *Prouty* v. *Citizens Utility Co.*, 150 F. Supp. 892 (D. Vt. 1957). On appeal, this Court reversed, holding that the grant of specific performance was effective interference with the prior state proceeding before the Vermont Public Service Commission, tantamount to the injunction of state proceedings forbidden by 28 U. S. C. § 2283. The final judgment, however, was that the complaint not be dismissed but instead held pending, so that in the event that the state determined that it had no jurisdiction the plaintiffs would be free to prosecute further federal proceedings to enforce their rights. 257 F. 2d 692 (2 Cir.), cert. denied 358 U. S. 867 (1958).

On February 16, 1959, the Federal Power Commission ruled that the Clyde River was navigable and directed the defendant to apply for a license for its future operations. 27 P. U. R. 3d 183 (1959). No mention was made of the condemnation proceedings then still pending before the Vermont Public Service Commission. On review in this Court, the order was affirmed on the ground that the last mile of the Clyde was navigable, and as defendant's activities along the upper reaches of the river affected the navigable portion, they were also within the regulatory jurisdiction of the Federal Power Commission. *Citizens Utilities Co.* v. *Federal Power Comm'n*, 279 F. 2d 1 (2 Cir.), cert. denied 364 U. S. 893 (1960). This, however, did not prevent the Vermont Public Service Commission from ruling later in 1960 that it had jurisdiction over the condemnation proceedings (pending since 1956) and awarding $95,000 compensation for the property. (It should be noted that expert valuations of the property ranged from $2,000 to about $215,000. Only the plaintiffs themselves testified that it was worth $300,000.) But the order granting compensation was reversed "for want of jurisdic-

tion" by the Supreme Court of Vermont. *Citizens Utilities Co.* v. *Prouty*, 122 Vt. 443, 176 A. 2d 751 (1961), cert. denied 369 U. S. 833 (1962).

The litigants returned to the District Court for the District of Vermont where it was again held on the 1956 complaint that the plaintiffs are entitled to specific performance of the contract at the set price of $300,000. The Court based its conclusion on the holding of the Supreme Court of Vermont, stating that the finding of present lack of jurisdiction necessarily implied lack of jurisdiction at the outset, and that therefore the defendant never properly complied with the condemnation alternative in the lease. See 209 F. Supp. 26 (D. Vt. 1962). Though our rationale differs somewhat from this, we agree with the result and affirm the judgment.

As a matter of law, it is not necessarily true that a present lack of jurisdiction requires a finding that jurisdiction has always been absent. There have been examples of ouster of originally valid jurisdiction through supervening changes in facts or law. See, e.g., *Ex Parte McCardle*, 7 Wall. (74 U. S.) 506 (1869). Apparently realizing this, the parties have directed their entire arguments to the interpretation of the language of the Supreme Court of Vermont, attempting to convince us either that that Court did or did not decide that proper initial jurisdiction in the Vermont Public Service Commission had been "ousted" by the later action of the Federal Power Commission. Their difficulties stem not from a lack of clarity in that decision but from the fact that the Supreme Court of Vermont did not have the issue of initial jurisdiction before it and so, quite properly, did not decide it. All that the Supreme Court of Vermont was called upon to decide was whether, once the Federal Power Commission had required Citizens Utilities to secure a license, the Vermont Public

Service Commission could still act to condemn property on behalf of Citizens Utilities. The original state of affairs in 1956 therefore remains to be determined by this Court.

As this is a diversity action, we look first to Vermont law to decide the question whether the Vermont Public Service Commission had jurisdiction in 1956 of the condemnation proceedings instituted by Citizens Utilities. We find controlling authority in *In re Bellows Falls Hydro-Electric Corp.*, 114 Vt. 443, 47 A. 2d 409 (1946). In this action, the Supreme Court of Vermont dismissed on its own motion for lack of jurisdiction an appeal from an order of the Vermont Public Service Commission which had purported to regulate hydroelectric development on a navigable stream. The Court held that federal legislation had pre-empted the field and that the Commission had no jurisdiction to act, quoting extensively from *First Iowa Hydro-Electric Co-op.* v. *Federal Power Commission*, 328 U. S. 152 (1946). The case was cited with approval in *Citizens Utilities Co.* v. *Prouty*, *supra*, and we have no reason to suppose that it is not still the law of Vermont. It thus seems clear that Vermont would hold that without a license from the Federal Power Commission to the applicant, the Public Service Commission had no jurisdiction to condemn land in connection with a project involving navigable waters, even in the absence of any federal action. In light of this holding, we need not consider the problem of conflict with federal law that would be presented by a contrary resolution of the jurisdictional question. See *First Iowa Hydro-Electric Corp.* v. *Federal Power Commission*, *supra*.

Giving the terms of the contract their plain meaning, we find this determination dispositive of the case. To take advantage of the condemnation alternative, defendant was required to bring proceedings before a tribunal that would have power to hand down a "final" adjudication of the

value of the property and to decree its sale. This is the meaning of "jurisdiction" as the parties used it. Defendant did not do this. The evident purpose of the six months limitation and the three stated alternatives was to ensure that the plaintiffs could have a speedy sale at the termination of the lease. Defendant's actions thwarted this purpose. The plaintiffs were easily enough able to ascertain that the Vermont Public Service Commission was not the proper body before which to bring the condemnation proceedings, as witnessed by their institution of this action on what has proven to be the correct theory of the law only six weeks later. The decision of the Supreme Court of Vermont in *In re Bellows Falls Hydro-Electric Corp., supra*, had been on the books for some years. Vermont law refers to the necessity for a federal license or a state certificate—neither of which defendant had. 30 Vt. Stats. Ann. §§ 111(b), 115. Citizens Utilities apparently thought that it was worth the risk of having to pay $300,000 for the property to attempt to avoid having to secure the license required of it by federal law, with the attendant federal regulation. It is hardly reasonable to suppose that Citizens Utilities is surprised by the outcome of this litigation and that it did not realize in 1956 that it could have avoided the possibility of a sale at $300,000 at least by instituting parallel proceedings with the Federal Power Commission. The mistaken gamble is tantamount to a deliberate rejection of the condemnation alternative. The agreed terms of the contract gave the burden of making the choice of alternatives to the defendants. Plaintiffs are entitled to the benefits of this choice, for whatever reason it was made.

Defendant also assigns as error the amendment of the judgment to permit tender of separate deeds by the four plaintiffs and separate payment to them, as well as crediting defendant with amounts paid to plaintiff Elsinor Prouty

Mallory, "under an alleged contract." The purpose of the amendment was to permit the sale to be completed as far as possible despite a settlement agreement apparently made between defendant and Elsinor Prouty Mallory which the latter is now seeking to avoid through litigation presently pending. Defendant is concerned that this amendment will somehow adjudicate the invalidity of its settlement agreement and earnestly importuned us to set the amendment aside. We do not see how this is so; nor do we understand Judge Gibson to have intended any such result. The agreement and negotiations leading to it were not before him and they are not part of the record on appeal. More to allay the fears of the defendant than to correct error we order that the amended judgment be modified by adding the following sentence at the end: This judgment does not affect the validity or invalidity of any settlement made between defendant and plaintiff Elsinor Prouty Mallory.

So modified, the judgment is affirmed.

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HAYS, *Circuit Judge*, dissenting:

In the sense in which the words of the contract should be read the Vermont Public Service Commission had jurisdiction over the condemnation proceeding brought by the defendant Company. The Commission was the appropriate body before which to bring such a proceeding, and it had the power to condemn the property. This is surely all that the parties could have meant by their agreement.

By reading the contract with even greater strictness than one would expect to find employed in the construction of the most technical of statutes the majority holds that, since the Vermont Commission could not proceed until the Company secured a license from the Federal Power Commission, the Vermont Commission did not have juris-

diction. For all that appears the Company in entire good faith believed that it was not required to have such a license. By the present decision its mistake as to the necessity of having a license is made the excuse for giving plaintiffs a windfall in the form of receiving $300,000 for property which was found in the abortive condemnation proceedings to be worth $96,000.

I must respectfully dissent.

# APPENDIX B

TEXTS OF PERTINENT DECISIONS AND STATUTE NOT PRINTED IN THE RECORD BEFORE THE CIRCUIT COURT

## DECISION OF DISTRICT COURT OF VERMONT

### UNITED STATES DISTRICT COURT

D. VERMONT

April 9, 1957
Civ. A. No. 2015

CHARLES T. PROUTY, *et al.*,

—v.—

CITIZENS UTILITIES COMPANY.

ARTHUR L. GRAVES, St. Johnsbury, Vt., HAROLD I. O'BRIEN, Rutland, Vt., *for plaintiffs.*

CLIFTON G. PARKER, Morrisville, Vt., *for defendant.*

GIBSON, *District Judge*:

Plaintiffs seek specific performance by the defendant of a contract under the terms of which plaintiffs claim they are entitled to receive $300,000 from defendant, and in turn they are ready, willing, and able to deed certain real estate located along the Clyde River—in Orleans County, Vermont—to the defendant. Plaintiffs also seek an injunction restraining the Public Service Commission of Vermont from asserting jurisdiction of a petition for condemnation of this same real estate brought by the defendant before the Public Service Commission.

The defendant, in its answer, filed four affirmative defenses: First, that this Court lacks jurisdiction; second, that the Federal Power Commission is the only agency or tribunal that has jurisdiction; third, that the Vermont Public Service Commission has jurisdiction to hear defendant's condemnation petition now pending before it; and fourth, that the plaintiffs' complaint failed to state a cause of action.

The defendant also filed a motion to dismiss and a motion for judgment before trial, each based substantially on the affirmative defenses set forth in its answer.

This Court overruled the first, second, and fourth affirmative defenses, reserving decision on the third affirmative defense.

Trial was had in Rutland on November 13, 14, and 15, 1956. An advisory jury rendered a verdict declaring the Clyde River to have been a navigable stream at the time the defendant filed its petition for condemnation before the Vermont Public Service Commission.

## Findings of Fact

1. The four individual plaintiffs, Charles Prouty, Genevieve Gage, John Prouty, and Elsinor Mallory, are citizens of Connecticut, Vermont, Vermont, and Florida, respectively. Plaintiff, the Third National Bank & Trust Co., is a Massachusetts corporation. Defendant is a utility company organized under the law of Delaware. The amount in controversy exceeds $3,000.

2. The plaintiffs are the present owners and successors in title to the lands and interests previously owned by Abbie D. Prouty, deceased, and are her only heirs.

3. Defendant is a utility company supplying electric power and energy to consumers in northern Vermont and

Canada, as well as in three other states. It is the successor in ownership of the Newport Electric Light Co.

4. On July 29, 1930, the Newport Electric Light Co. and Abbie D. Prouty executed under seal a written contract providing, in substance, for a lease for a term of 25 years from the 1st of October, 1930, of land and interest in Newport, Vermont, described in the contract as follows:

"Being all and the same land and premises which were conveyed by Spaulding Brothers Corporation, a corporation, to Charles A. Prouty by warranty deed dated December 31, 1906, and recorded in Book 27, Pages 595 and 596 of the Land Records of the Town of Derby, Vermont, more particularly described as the 'Spaulding Pulp Mill Property' so-called, situated on Clyde River in the City of Newport, Orleans County and State of Vermont, a little above the plant of the Newport Electric Light Company, with all waterpower and water privileges thereunto belonging or appertaining. Being the same land and premises conveyed to said Spaulding Brothers Company, a corporation, organized and existing under the laws of the State of Vermont by three several deeds:—

"(1) By a quit-claim deed from Edward F. Spaulding to said Corporation, dated August 26, 1901, and recorded in Book 25, page 80 of the Land Records of said town of Derby.

"(2) By a quit-claim deed from Waldo Spaulding to said corporation, dated August 26, 1901, recorded in Book 25, page 81 of the Land Records of the said Town of Derby.

"(3) And by Huntley N. Spaulding, as administrator of the estate of Jonas Spaulding, by an adminis-

trator's deed dated August 26, 1901, and recorded in Book 20, page 300 of the said Land Records, to which deeds and said records thereof, reference is hereby made for a more particular description.

"Meaning to include what is known as the Pulp Mill Property, water power, dam, water privileges, and all buildings, machinery and fixtures now on said property, and being the same real estate which was conveyed to the Newport Electric Light Company by Charles A. Prouty by an instrument dated June 29, 1907, and recorded in the Derby Land Records in Book 28, Pages 367 and 368; all of said property having been willed to Abbie D. Prouty by the late Charles A. Prouty, and having been decreed to said Abbie D. Prouty by the Probate Court, for the District of Orleans, State of Vermont."

5. The above-described lands constitute an irregularly shaped piece of land that lies astride the Clyde River. The Clyde River runs in a northerly direction for about 700 feet through approximately the center of this piece of land.

Prior to 1930, the date of the lease, there had been a dam across the Clyde River, known as the Pulp Mill Dam. This dam lay about 225 feet from where the Clyde River enters this property on its southerly boundary. The dam had been abandoned, however, and there were only remnants of it there at the time of the lease.

Along the Clyde River, about 200 feet northerly or northeasterly of this abandoned dam, had been an old pulp mill and shed, and at one time water from the Pulp Mill Dam was conveyed down to the old pulp mill by a penstock. That penstock was still there and being used on the date of the lease. Indeed on the date of the lease there was a penstock running the entire length of the land in question along

the east bank of the Clyde River, and in the vicinity of the old pulp mill it ran squarely in the bed of the Clyde River.

The predecessor in title of the defendant had constructed the penstock from where it entered the southerly edge of this property to the old penstock at the Pulp Mill Dam and there connected with the old penstock. It also erected the penstock which ran from the northerly terminus of what I will term the "Pulp Mill Dam penstock", in the vicinity of the old pulp mill, some 325 feet until it left the above-described premises at their northern border. This penstock continued on in a northerly direction to the power station of the defendant, located near the mouth of the Clyde River. Thus there was a penstock running across this entire property, most of it adjacent to the Clyde River on its east bank, totalling approximately 725 feet in distance in existence and in use at the date of the lease.

In 1931 or 1932, the defendant's predecessor in title constructed a second penstock from Clyde Pond to its power station near the mouth of the Clyde River. This second penstock lies easterly of the first penstock and crosses these lands for about 50 feet at the southeasterly corner of these premises and again for another approximately 175 feet running along the southeasterly border of these premises.

Both penstocks were being used by the defendant for the transportation of water when the lease hereinbefore referred to expired on the 1st day of October, 1955, and the defendant is continuing to use these penstocks at the present time. Both penstocks carry water diverted from the Clyde River.

6. This lease provided that the Newport Electric Light Co., its successors and assigns would pay Abbie Prouty, her heirs, administrators, executors and assigns, monthly rental at $65 and pay one-half of all taxes and assessments levied against this property during the term of the lease.

7. The lease also contained the following provisions:

"The Lessee may acquire title to the property described herein at any time prior to October 1, 1935 by paying the Lessor therefor the sum of $150,000.00 and any rentals then due and owing in accordance with the terms hereof. If the Lessee elects to so purchase said property within said period of time and tenders the purchase price above described to the Lessor, the Lessor shall execute and deliver to the Lessee coincident with said tender of payment, a warranty deed conveying to the Lessee fee simple title to the property described herein, free and clear from all charges and or encumbrances against the same, and thereupon this agreement shall terminate, and both parties be released from further liability hereunder.

"Should the Lessee not elect to acquire title to the property described herein prior to October 1, 1935, then the Lessee agrees that within six months after October 1, 1935 it will purchase, and the Lessor agrees that within said six months period, she will sell and convey the premises herein described to the Lessee and by good and sufficient warranty deed convey said premises to said Lessee in fee simple, free and clear of all charges and encumbrances against the same at a price satisfactory to both parties hereto, or if they cannot agree upon such a price, then at a price to be determined in the following manner:

"(a) The Lessee shall within said six months period institute proceedings to acquire the property above described by condemnation, such proceedings to be instituted before the tribunal then having jurisdiction of such proceedings. The value fixed in said proceedings for the property herein described shall be the price which the Lessee shall pay, and the Lessor accepts for the deed above described to said property.

"(b) If no price is agreed upon by the parties within said six months period, or if the Lessee has not instituted condemnation proceedings within said period as provided in the preceding paragraph, then the price which the Lessor shall pay to the Lessee for said deed to said property shall be the sum of $300,000.00.

"The Lessee agrees that if it elects to proceed by condemnation proceedings as herein provided, it will prosecute said proceedings with all reasonable diligence to a termination thereof.

"For the period that may elapse between October 1, 1955 and the date when the Lessee acquires title to the property from the Lessor as herein provided, the Lessee shall pay the Lessor on the last day of each month during said period, as and for rental for the use of said property during said period, the sum of $625.00, and in addition shall pay one-half of any taxes or assessments levied against said property during said period."

8. The Lessee did not choose to acquire title to this real estate, water power, dam, water privileges, and all buildings, machinery and fixtures then on this property prior to October 1, 1955, as provided for in the contract. Nor have the plaintiffs and defendant, since October 1, 1955, reached an agreement as to a satisfactory purchase price.

9. The defendant has not paid, or offered to pay, to the plaintiffs the sum of $300,000. The plaintiffs have at all times been willing, ready and able to tender to the defendant a satisfactory deed of this land, water power, dam, water privileges, and all buildings, machinery and fixtures on the property as of the date of the lease.

10. On March 27, 1956, the defendant filed a petition with the Vermont Public Service Commission seeking to

condemn the property and interests therein as described by the lease. This petition is still pending.

11. The jury found that the Clyde River was, in fact, a navigable stream within the meaning of the Federal Power Act. This verdict of the jury I approve.

12. Clyde River's source is in Island Pond in Brighton, Essex County, Vermont. It flows northwesterly through Charleston, Salem, Derby, and Newport into Lake Memphramagog. Generally speaking, it is a sluggish stream until it reaches to within a few miles of Lake Memphramagog. On its course it passes through Pensioners Pond and Salem Pond. It has a few short rapids. It is a principal tributary of Lake Memphramagog—itself a navigable body of water.

13. In the 18th Century it served as a highway for the Indians. From the St. Lawrence River the Indians would come up to the St. Francis and Magog Rivers in canoes, cross Lake Memphramagog, ascend the Clyde to Island Pond, and then make a short portage to the headwaters of the Nulhegan River—down the Nulhegan to the Connecticut River and down the Connecticut. Likewise, another Indian trail followed the same route from the St. Lawrence to the Connecticut; thence to the upper Ammonoosuc—up that river to some point in what is now Milan, New Hampshire; thence across to the Androscoggin River—and down it to the Atlantic Sea Coast and Penobscot Bay.

14. The Department of War sent a report to the House of Representatives of the Congress in April, 1826, which reported on the feasibility of a waterway from Lake Memphramagog to the Connecticut River by this route, and reported, in substance, that it was a practicable project.

15. During the 19th and early 20th Centuries the Clyde River was used as a highway for commerce. Logs were floated from its upper reaches to saw mills in Derby. Logs were converted into lumber, transported to Newport and freighted by rail to Boston. Pulp was floated from the upper reaches of the Clyde River to Lake Memphramagog.

16. The defendant Citizens Utilities Company has not applied for or obtained a license from the Federal Power Commission, pursuant to the Federal Power Act, 16 U.S.C.A. § 791a et seq., for the purpose of constructing, operating and maintaining its said dam, water conduits, reservoirs, power houses, transmission lines and other works for the development, transmission and utilization of electrical power and energy, across, along, from, over, and in the Clyde River.

17. The defendant Citizens Utilities Company, notwithstanding the construction and operation of its said dam, water conduits, reservoirs, power houses, transmission lines and other works across, along, from, over, and in the Clyde River, has never filed a declaration of its intention with the Federal Power Commission to construct, improve, operate or maintain its said dam, water conduit, reservoir, power house, transmission lines and other works, or any of said structures, across, along, from, over, and in the Clyde River, pursuant to Section 23 of the Federal Power Act, 16 U.S.C.A. § 817.

18. The interest of the plaintiff, the Third National Bank and Trust Company, is nominal only, being that of a naked trustee for the benefit of Charles T. Prouty, and that it joins as a party plaintiff only, that all proper parties may be before the Court.

## Conclusions of Law

[1] Here we have a contract action between citizens of different states, and the matter in controversy exceeds the value of $3,000, exclusive of interest and costs. Under § 1332(a) (1) of the U.S. Code, Title 28, this Court has original jurisdiction of this action. The defendant's first affirmative defense of lack of jurisdiction is entirely without substance.

[2] Nor is there any merit in the fourth affirmative defense, i.e. that the complaint fails to state a cause of action. The complaint clearly alleges the existence of a written contract, a breach thereof, and a failure on the part of the defendant to comply with its terms. It asks for specific performance of the contract by the defendant.

[3, 4] Likewise, the defendant's second affirmative defense is unsound. It is to the effect that in any suit wherein violations of the Federal Power Act are involved, and compliance with the Act is sought, the proceedings must be brought exclusively by the Federal Power Commission. As a statement of the law, this proposition is valid. However, it is not applicable to this case. This action is a suit on a contract, for specific performance of a land purchase agreement; it is not a proceeding to compel compliance with the Federal Power Act. This suit does, as an incidental question, involve the interpretation of the Federal Power Act. This Court has jurisdiction to adjudicate such questions. There is nothing in the Federal Power Act, or any of the many Federal cases decided under it, which denies the U. S. Courts of jurisdiction to entertain suits which may incidentally involve interpretation of the Federal Power Act. Were such the case, and were we to hold as the defendant urges, the rendering of a final decision in a dispute such as this would be slowed down to a snail's pace. Prompt judicial determination of issues such as this would be ren-

dered impossible. The whole cause of justice would be harmed. In United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243, the United States brought a bill for an injunction against the Power Co., alleging that the New River was navigable. The District Court, 23 F.Supp. 83, heard the case and ruled the New River was non-navigable; the Court of Appeals agreed, 107 F.2d 769; but the Supreme Court held otherwise. No question was raised there that only the Federal Power Commission could determine the fact of navigability or non-navigability; nor could it have been successfully raised. The Federal Power Act grants no such exclusive right to the Federal Power Commission.

Thus we come to the third affirmative defense—and, as I see it, to the crux of this case. The defendant claims that the Vermont Public Service Commission does have jurisdiction to entertain the petition the defendant filed with that Commission on March 27, 1956. The prayer of that petition asks that "an order be made by the Commission entitling the petitioner to condemn said property and interests therein as above described." The "above described" refers to the description in the lease.

What is it that the defendant seeks to have the Vermont Public Service Commission condemn—it is what "is known as the Pulp Mill property, dam, water privileges, and all buildings, machinery and fixtures now on said property". It thus seeks to condemn the penstocks or water conduits being maintained and operated on this propert. These water conduits are fixtures. It seeks to condemn water privileges—it must be the privilege of flowing waters diverted from a navigable stream through these conduits and ultimately to its power dam that it seeks to condemn. It seeks to do this without having sought or obtained a license to do so from the Federal Power Commission.

When Vermont joined the Union in 1791, it subscribed to the Constitution of the United States. The Commerce Clause of this Constitution grants to the United States full and exclusive power over those waters which are capable of use as interstate highways. At that time, Vermont, then, would have jurisdiction of the riparian banks and bed of a navigable stream, and the United States jurisdiction over the water flowing in the stream.

After several different attempts by the Congress, through Rivers and Harbors Acts, to effectively control these navigable streams, it finally passed, in 1920, the Federal Power Act. In 1930, the year the contract here sought to be enforced was signed, it amended the Federal Power Act and established the Federal Power Commission.

The Federal Power Act was designed, amongst other things, to integrate the Federal and State jurisdictions in licensing water power projects. In this Act there is a separation of those subjects which remain under a state's jurisdiction from those subjects which the Commerce Clause of the United States Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Federal Power Act establishes a dual system of control. The United States and the State each have final authority within their own jurisdiction.

[5] Where the Federal Government supersedes the State Government, there is no thought that the two agencies shall each have final authority. Thus the Federal Government, by the Federal Power Act, is given exclusive jurisdiction to issue licenses for construction of dams, conduits, etc. in any stream over which Congress has jurisdiction. Title 16, Section 797(e), U.S.C.A. To control conditions under which these licenses are granted, Section 803 was enacted. Particularly pertinent to this case (to forbid any person, state or municipality from constructing, operat-

ing, or maintaining any dam, water conduit, etc. across, along, or in any of the navigable waters of the United States), Section 817 was enacted. In these fields the jurisdiction of the United States is supreme. Congress, in 1935, by the amendment then adopted to the present Section 817, expressly required a Federal license for every water power project in the navigable waters of the United States.

It left to the States permission to construct such projects upon compliance with State laws, rather than with the Federal Power Act, provided the projects were not in navigable waters of the United States, did not affect the interests of interstate or foreign commerce, and did not affect the public lands or reservations of the United States.

Section 817 superseded state laws as to any state jurisdiction over dam construction or maintenance on navigable waters.

Clearly then, the Federal Power Act was an act seeking to integrate Federal and State jurisdiction in this field, and clearly the Federal Government has superseded the State Government in its jurisdiction of the Clyde River so far as power and navigation rights are concerned.

As I have commented, a main item of interest to the defendant in its petition to the Public Service Commission is to acquire the penstocks running over this property through which is carried the diverted water which helps manufacture the defendant's water power.

[6] A dual final authority, with a duplicate system of State permits and Federal licenses required for each project, would make for chaos. It would be an impossible and completely unworkable situation. Congress did not intend to create such a situation. The Federal Power Act was meant to give the Federal Power Commission exclusive jurisdiction over all matters affecting a navigable stream.

It is clear to this Court that in this instance, the defendant, to comply with the terms of its contract, should have applied to the Federal Power Commission for a license or permission to acquire this property and interests therein.

It may well be, though we will never know, that when the parties executed the contract in 1930, the parties themselves were undecided as to what the tribunal would be which would have jurisdiction over the acquisition of these properties in 1955-1956. The Federal Power Act, passed in 1920, was amended in 1930, and the Federal Power Commission thereby created. It would have been a simple matter, had the defendant any doubt in its mind as to the tribunal having jurisdiction, to have filed a petition with the Federal Power Commission—as well as the Vermont Public Service Commission. Thus it could easily have abided by the terms of its contract.

This Court has spent considerable time in legal research of the problem in this case, but has found no cases which seem to be directly in point. However, my conclusion regarding the defendant's third affirmative defense seems to be in accordance with the holding and intent of the U. S. Supreme Court, as found in the case of First Iowa Hydro-Electric Co-op. v. Federal Power Commission, 1946, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143.

[7, 8] Thus it follows that since defendant, on March 27, 1956, was maintaining these penstocks carrying water of a navigable stream across property it was seeking to condemn—including these penstocks—and it was not a licensee of the Federal Power Commission when it filed its petition with the Vermont Public Service Commission, the Public Service Commission was without jurisdiction to hear and determine the petition. Since the defendant, on or before April 4, 1956, had not instituted condemnation proceedings before any tribunal having jurisdiction of such

proceedings for the purpose of acquiring the "Pulp Mill property, water power, dam, water privileges, and all buildings, machinery and fixtures" on this property as of October 1, 1930, the defendant is, under the contract, obligated to purchase the above-described property from the plaintiffs for $300,000.

Since the foregoing adjudication is dispositive of the case, the plaintiffs' request for an injunction restraining the Public Service Commission of Vermont from asserting jurisdiction of the petition for condemnation of this same real estate, is hereby denied.

Judgment Order

It is hereby ordered that the plaintiffs, Charles T. Prouty, et al., convey by warranty deed to the defendant, Citizens Utilities Company, all the realty, property, and proprietary interests described in the contract between the Newport Electric Light Co. and Abbie D. Prouty, dated July 29, 1929, pursuant to said contract. It is further ordered that upon tender of the above-described deed, the Citizens Utilities Company shall pay to the plaintiffs, Charles T. Prouty, et al., the sum of $300,000. Because the respective rights of the parties could not be determined before this date, no interest will be allowed.

## COMPANION DECISION OF CIRCUIT COURT OF APPEALS

### UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

(Argued April 8, 1960 Decided May 24, 1960)

No. 259, Docket 25705

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CITIZENS UTILITIES COMPANY,

*Petitioner,*

—v.—

FEDERAL POWER COMMISSION,

*Respondent.*

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MILTON S. GOULD, Gallop, Climenko & Gould, New York City, REUBEN GOLDBERG, Washington, D. C., CLIFTON G. PARKER, Morrisville, Vt., *for petitioner.*

JOHN C. MASON, Deputy Gen. Counsel, Federal Power Commission, Washington, D. C., *for respondent* (Willard W. Gatchell, Gen. Counsel, Howard E. Wahrenbrock, Solicitor, Leonard D. Eesley, Assistant General Counsel, Daniel Goldstein and Joseph B. Hobbs, Attys., Federal Power Commission, Washington, D. C., on the brief).

Before:

LUMBARD, *Chief Judge*, and
HAND and HINCKS, *Circuit Judges.*

HAND, *Circuit Judge*:

In this case the petitioner, a Delaware corporation, has built hydroelectric dams at several places on the Clyde River, Vermont, which rises in the northeast corner of the state and empties into Lake Memphremagog at Newport, Vermont. Lake Memphremagog itself extends from Newport across the border of Canada and into Canada.

After leaving a small pond, called Spectacle Pond, the Clyde passes through Island Pond, another small sheet of water, whence it meanders for six or seven miles until it is joined by a brook that carries the overflow of two other ponds, Seymour Lake and Echo Pond, at East Charleston. The Clyde continues for about five miles further, passing through Pensioner Pond and thence through Salem Pond until after three miles or so it passes through Clyde Pond and after about two miles more reaches Lake Memphremagog. The petitioner had already built dams at the outlets of Seymour Lake and Echo Pond and also across the river at West Charleston and at Clyde Pond. Another dam above the West Charleston dam had been built at Barton Village which the petitioner does not control. The occasion of this suit is the petitioner's construction of a new project including a "diversion dam," a canal, and a power plant, called Unit No. 11, across the river below the dam at the outlet of Clyde Pond.

In June 1957, the Commission began to investigate this partially completed power project in order to determine whether it was in the public interest to control it in order to preserve the navigation and water supply of the Clyde. In preliminary negotiations the parties stipulated that the petitioner should be free to oppose the jurisdiction of the Commission in spite of a "declaration of intention" made by the petitioner. The Commission held extensive hearings before a presiding examiner who wrote a deci-

sion declaring that the Clyde was not "navigable water of the United States" except for the first 4800 feet from its mouth, but that the petitioner's proposed Unit No. 11 and its Newport project affected the interests of interstate or foreign commerce in that part of the stream, and that the Commission therefore had jurisdiction under § 817 of Title 16, U.S.C.A., to grant or refuse a license to maintain both projects. The Commission reversed the examiner and found the whole river navigable, apparently from Spectacle Pond to its mouth, and also that not only Unit No. 11 and the Newport project affected the navigability of the river, but that the petitioner's other projects did so. The petition is to review all parts of the Commission's order.

There can be no doubt that the Clyde Pond dam and Unit No. 11 both have an effect upon the navigability of the river in its last 4800 feet. Indeed, the petitioner does not dispute that the volume of water that reaches the river below the Unit No. 11 changes when the "diversion dam" and the Clyde Pond dam are opened, as they are when hydroelectric generators at Unit 11 and at the Newport project are operated. It was proved that when the dams were opened, the height of the water below the Unit 11 rose eighteen inches and did not assume the level of the Lake until it reached Gardner Park Bridge at a distance of more than half a mile away. There was also evidence that the shut-down of Unit No. 11 made a sixteen foot boat with four passengers and 1800 pounds of freight repeatedly scrape bottom, although when the dam was opened the boat moved without touching. Again, when the power was shut off and the dams were filling, rocks showed above the water in the stream that were covered when the power was put on again. There was a regular correlation between the two, showing changes in total water volume at times of between 12 and 282 cubic feet per second.

[1] The petitioner's dams at West Charleston being about ten miles above the Clyde Pond dam, and those at Seymour Lake and Echo Pond being about twenty miles away, it is, of course, true that the effect of the "diversion dam" at Unit No. 11 and of the Clyde Pond dam upon the navigable part of the river is much more immediate than that of the dams upstream, but the water impounded by the upper dams can in the end escape only through that last mile, and the dams give the petitioner control over the time when it shall arrive. We omit the Barton Village project that does not belong to the petitioner; but Seymour Lake and Echo Pond together impound 4500 "acre feet" of water as against only 1000 "acre feet" impounded by the Clyde Pond dam. It cannot be said that the "effect" of the petitioner's control of so much water tributary to the navigable part of the river is so inconsiderable as to be beyond the scope of § 817; that is to say, that "the interests of interstate or foreign commerce would" (not) "be affected by the construction of a dam" of the kind here at issue. The only question before us is as to the jurisdiction of the Commission, not how far the public interest requires the Commission to regulate their maintenance and use. It must always be remembered that in construing subchapter I of chapter XII of Title 16 U.S.C.A., we are to take into consideration, not alone the condition of a stream as it is, but that "it is proper to consider the feasibility of interstate use after reasonable improvements which might be made." United States v. Appalachian Electric Power Company, 311 U. S. 377, 409, 61 S. Ct. 291, 300, 85 L. Ed. 243. Since there can be no doubt that the last mile of the river is "navigable" without change, the only question is whether the amount of water by which the petitioner can vary its flow affects that part of the river enough to give the Commission jurisdiction over the granting of a license.

[2] It is not necessary for us to measure how much such variation will justify actual intervention by the Commission. The "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive" (, 825/(b)), and it is apparent that the evidence was enough to prove that the petitioner's dams, without change and at the will of the petitioner, are capable of "affecting" temporarily the ow of water in the river below Unit 11, and, indeed, that they do so in the ordinary operation of the petitioner's business. The situation appears to us to be essentially the same as in Georgia Power Company v. Federal Power Commission, 5 Cir., 152 F. 2d 908, 913.

Concluding as we do that all the petitioner's dams on the Clyde River do "affect" the navigability of the last mile of that river, it becomes unnecessary for us to decide how much if any of the river above Unit No. 11 is "navigable." That question therefore we leave open.

The order of the Commission requiring an application for license is affirmed on the limited ground stated above.

---

## TITLE 16, UNITED STATES CODE, CHAPTER 12

[Federal Power Act; Section 27]

821. *State laws and water rights unaffected*

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation, or for municipal or other uses, or any vested right acquired therein. June 10, 1920, c. 285, 27, 41 Stat. 1077.

## APPENDIX C

### JUDGMENT

### UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of June, one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
*Circuit Judges.*

---

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THE THIRD NATIONAL BANK AND TRUST COMPANY,

*Plaintiffs-Appellees.*

—v.—

CITIZENS UTILITIES COMPANY,

*Defendant-Appellant.*

---

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is modified in accordance with the opinion of this court and as so modified said judgment be and it hereby is affirmed with costs to the appellees.

A. DANIEL FUSARO
*Clerk*

Office-Supreme Court, U.S.
FILED
SEP 25 1963
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

No. 128

CITIZENS UTILITIES COMPANY,
*Petitioner,*

VS.

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY AND THIRD NATIONAL BANK AND TRUST COMPANY,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF OF RESPONDENTS

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY, file this brief in opposition.

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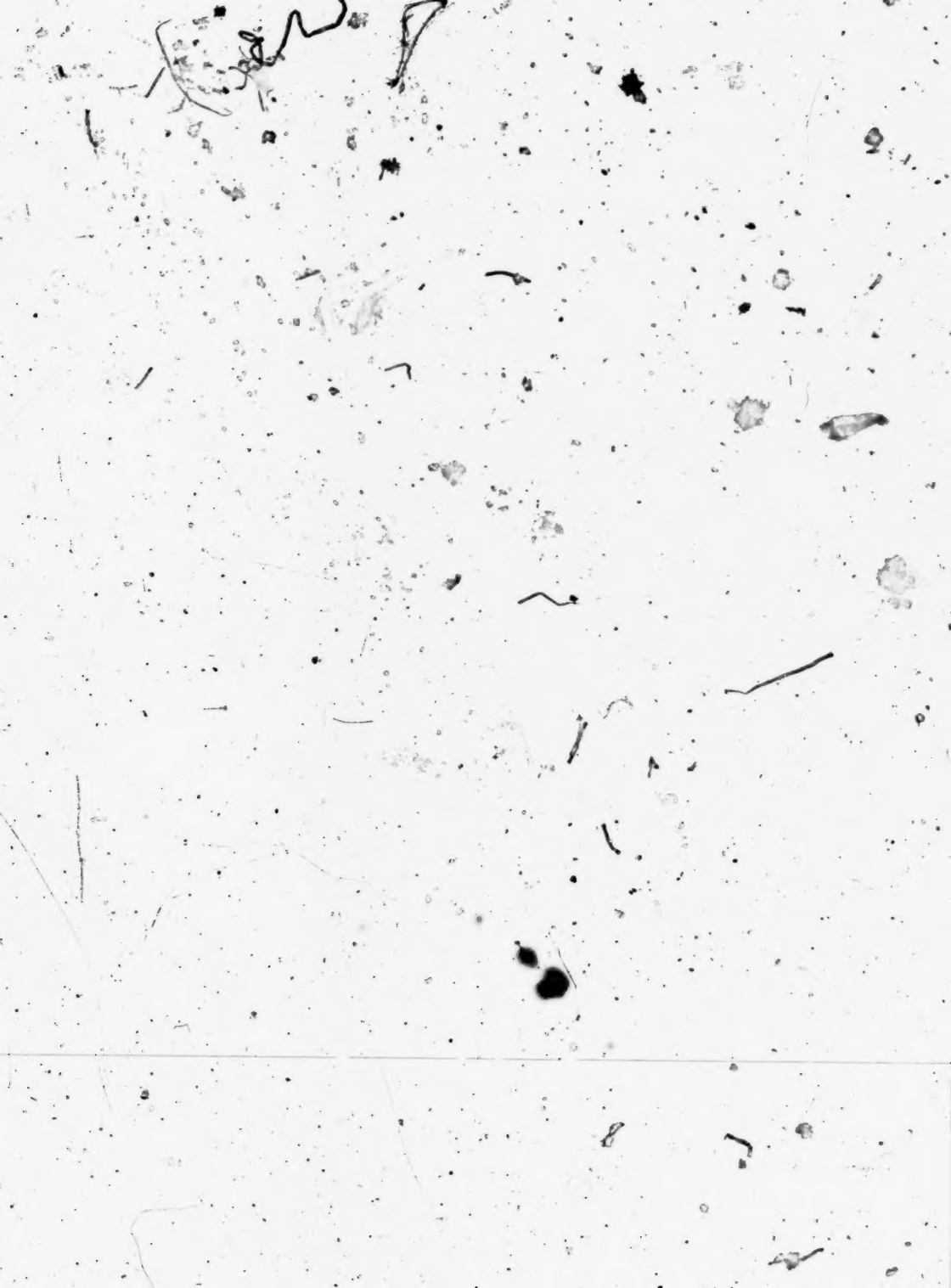
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 428

CITIZENS UTILITIES COMPANY,
*Petitioner.*

*v.*

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY AND THE THIRD NATIONAL BANK AND TRUST COMPANY,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF RESPONDENTS

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY AND THIRD NATIONAL BANK & TRUST COMPANY file this brief in opposition to the Petition of CITIZENS UTILITIES COMPANY for Writ of Certiorari to the United States Court of Appeals For The Second Circuit.

The petition fails to mention the order of the Circuit Court of Appeals dismissing the petition of Citizens Utilities Company for review of the order of the Federal Power Commission November 2, 1961, and reported in 295 F. 2d 950, Respondents' Appendix in the Circuit Court of

Appeals page 53a. This appendix will hereinafter be designated as "Rs' Appx."

## STATUTES INVOLVED

In addition to the Statutes set forth in the petitioner's appendices p. 29a and in its appendix before the Circuit Court of Appeals (R. 143a-145a) the respondents rely upon §21 of the Federal Power Act, 16 U.S.C.A. §814, (Rs' Appx. 8a) and 30 V.S.A. §115, (Rs' Appx. 7a). The Vermont Statutes of 1947 §§9331-9333 (R. 143a) are now known and generally referred to in the relevant court opinions and elsewhere as 30 V.S.A. §§109-111.

## QUESTIONS PRESENTED

This case is back in this Court on a second petition for certiorari by Citizens. Much that was said in respondents' brief on the first petition is applicable here, particularly upon the point that there is no Federal question here involved or any question of importance or of more than local and not Federal import. The questions involved here are not unlike those involved in the former petition.

The similarity between the artificial questions framed by petitioner in its former petition and those here presented on page 3 of the petition can not be obscured. Compare the first and principal "question" set forth in the former petition to review the decision of the Vermont Supreme Court in *Citizens Utilities Company* v. *Prouty, et als*, 122 Vt. 443, cert. denied; 369 U. S. 838 (R. 119a; 131a) viz:

> "1. Does an order by the Federal Power Commission, without any other or further action on its part, directing a public service corporation, legally existing and operating under state authority, to apply for a license from the Federal Power Commission, in and of itself oust; on the ground of pre-emption, the Vermont Public Service Commission of jurisdiction to continue a condemnation proceeding then validly pending before it?"

Just as petitioner then claimed that the Vermont Supreme Court had given a retroactive or *ex post facto* effect to the exercise of jurisdiction by the Federal Power Commission, so now Citizens claims the Federal District Court and the Court of Appeals have made the exercise of jurisdiction by the Federal Power Commission retroactive, and that such holdings present a federal question of "far reaching importance." This is a wholly false issue. Nothing could be farther from the truth. All that these courts have ruled is that, consistently with the Federal Power Act, by Vermont law; both statutory and court decided, the state Public Service Commission did not have jurisdiction with respect to petitioner's project, because it involves navigable waters of the United States and petitioner lacked the license from the Federal Power Commission necessary for its maintenance and operation.

It will be helpful to keep in mind the geographical conditions which are involved.

Lake Memphramagog is a large international lake crossing the boundary of the United States and Canada. Clyde River, located in Vermont, is a principal tributary having a large flow of water so that it affects Lake Memphramagog. Its flow is sufficiently great to cause Citizens to own and control several dams and electric power stations upon it. (Appendix B 17a-18a and 279 F. 2d 1). These are facts of which the courts take judicial notice. *Boutwell* v. *Champlain Realty Co.*, 89 Vt. 80, 86. Therefore, Clyde River is to be classified as navigable waters the same as the Connecticut River and many other rivers throughout the United States, several of which have been involved in litigation in the United States Supreme Court.

It was not necessary to have them specifically declared navigable waters by Congress. By the Federal Power Act, as amended in 1930, they became subject to the exclusive jurisdiction of the Federal Power Commission. Action by that Commission was not necessary to make Lake Memphramagog or Clyde River subject to its jurisdiction. Confirmation of Clyde River being navigable waters is found in decisions of the Circuit Court of Appeals, the United States District Court, the Vermont Supreme Court and in pro-

ceedings resulting in orders of the Federal Power Commission. They are referred to at pages 1 and 2 of the petition. None of these limit the time as to navigability and it is a matter of common knowledge to be judicially noticed that there has been no substantial change in the conditions of Clyde River for many years.

Therefore, the questions presented by I(a) and I(b) on page 3 of the petition, which are based wholly on retroactivity, do not exist.

The word "retroactively" used by Citizens, or any other similar word, does not appear in the opinions of the Circuit Court of Appeals, or the United States District Court, or the Vermont Supreme Court.

Citizens is raising fictitious questions not supported by the record and its argument therefore is fallacious throughout.

The issues are not those propounded in the petition, pages 3 and 4.

As the record clearly shows and as will be demonstrated in this brief the questions set forth on page 3 of the petition never arose and have no proper place in this case.

The *only* issue is simply:

Was the Circuit Court of Appeals correct in deciding that as a matter of *local* law the State Public Service Commission did not have jurisdiction to hear and decide the proceeding brought by petitioner to condemn respondents' property upon a navigable river, when petitioner had no license or other authorization so to do?

The decision of the Circuit Court of Appeals is fully supported by:

(1) Vermont authorities holding that the Federal Power Act preempted the field of hydro-electric development upon a navigable river, in accordance with *First Iowa Hydro-Electric Corp.* v. *Federal Power Commission*, 328 U. S. 152, AND

(2) Vermont Statutes under which the state commission lacked authority to entertain Citizens' petition for condemnation.

## STATEMENT

The "statement" in the petition for writ of *certiorari* contains certain assertions which should be corrected and omits much that is important in the opinions and holdings of the courts below and in related cases. Thus the District Court based its opinion that the Public Service Commission never had condemnation jurisdiction in respect to respondents' riparian land, *not* upon the determination of the Federal Power Commission that the Clyde River was navigable, but upon the *fact* that "the Clyde River is navigable water, and the Federal Power Commission has had exclusive jurisdiction over it, certainly since the creation of the Federal Power Commission." (Rec. page 532; R. 84a). Moreover, the fact of navigability and the right of Congress to exercise control over the entire river is not an issue here.

Neither did the district judge interpret (as Petition page 4 asserts) a prior holding of the Vermont Supreme Court in a companion action that the Public Service Commission's jurisdiction was "ousted" subsequent to assumption of jurisdiction by the Federal Power Commission. There is *no such holding*. In substance, all that the Vermont Supreme Court decided was that in the absence of a license from the Federal Power Commission the State Public Service Commission had no jurisdiction of the eminent domain proceedings. The holding is in these words:

> "Without the license the Public Service Commission lacks the proof of authorization of the project required by 30 V. S. A. §111 (1) which is necessary for jurisdiction of the eminent domain proceedings brought by the petitioner.
>
> "The judgment order of the Public Service Commission, dated Nov. 10, 1960, purporting to authorize the petitioner, Citizens Utility Company to condemn and to acquire the petitionees' property upon the payment of $95,000.00 is reversed for want of jurisdiction."

*Citizens Utilities Company* v. *Prouty, et als*, 122 Vt. 443, 452-453, 176 A. 2d 751; R. 131a.

The Vermont Supreme Court in Re *Bellows Falls Hydro-Electric Corp.*, 114 Vt. 443 never said that "*after* the Federal Power Commission had assumed jurisdiction * * * * "it had thereby * * * preempted the field" as Citizens erroneously states at page 14 of its present petition. On the contrary, that opinion makes no reference whatever to the Federal Power Commission, or to the Commission's having assumed jurisdiction; instead it treats the navigability of the Connecticut River as an unquestioned fact. Indeed it could not do otherwise in view of the language of its former opinion in *Boutwell* v. *Champlain Realty Co.*, 89 Vt. 80, 86, 94 Atl. 108, (1915) where the Vermont court took judicial notice of the navigability of the Connecticut River in these words:

> "One of the chief geographical features of the State is, that its eastern border is washed by the Connecticut River; and it is a matter of historical knowledge that the Connecticut has always been a public highway upon which, in early times, a portion of the merchandise and productions of the eastern part of the State, including lumber, were transported in boats or otherwise; and it is of common knowledge that in more recent times it has been used as a great public highway for the floating of logs to places further south in this State, and to places in the State of Massachusetts. These facts, therefore, are judicially noticed."

It is thus apparent that it was the fact of navigability and not that the Federal Power Commission recognized such navigability, which has prompted the Vermont Supreme Court twice to hold that the State Public Service Commission lacked jurisdiction with respect to navigable waters of the United States.

In its brief, Petitioner improperly refers to its contractual obligation as a "penalty" or "forfeiture," although no such point was ever raised or briefed in any of the courts below. On the contrary, the question of penalty or forfeiture is definitely excluded by petitioner's answer in the District Court wherein it designated the provision of the lease,

(which it now calls a penalty clause) as an "alternate right" available to it in these words:

> "18. Admits the allegations in paragraph numbered '18' of the Complaints; and avers that the right to acquire said plaintiffs' realty for the sum of three hundred thousand dollars is not obligatory upon this defendant, but is an alternate right which this defendant has not exercised, all as more particularly appears by the precise terms of said Agreement, of which a copy is attached." (R. 17a.)

## SUMMARY

Consistently with the Federal Power Act, as interpreted in the First Iowa Case, the Vermont Courts, as a matter of local law, recognize that the regulation of navigable waters of the United States and their principal tributaries has been preempted by federal authority. Consequently, they have held (1) that the State Public Service Commission had no authority to issue a state permit for the development of a hydro-electric plant upon a navigable river, and (2) in a companion case to that presently before this court, that the state commission had no jurisdiction of a condemnation petition involving riparian lands upon navigable streams brought by a would-be condemnor, lacking a license from the Federal Power Commission for the operation and maintenance of its project.

The statutory law of Vermont recognizes the preemptive and paramount authority of the Federal Power Commission in all condemnation cases involving navigable waters, in that it requires either a state certificate of public good authorizing the project or a license from the Federal Power Commission. While obviously they are not interchangeable and a state certificate of public good is not a substitute for, or the equivalent of, a license from the Federal Power Commission, the important point as respects petitioner's lack of authority is that is possessed neither one nor the other. At all times here material it has had *no* state certificate of public good and no license from the

Federal Power Commission. These facts are undisputed and *res adjudicata*.

Notwithstanding certain unwarranted constructions put upon the opinions of the Vermont courts by the petition and the inclusion in the petition of irrelevant matters, not properly part of, or contradicted by, the record, no federal question is involved, because Vermont may regulate, limit and restrict the exercise of the power of eminent domain by the petitioner, a foreign corporation, provided its requirements are consistent with federal law. This Vermont may do in a particular case even though the Federal Power Commission has not previously assumed jurisdiction.

## HERE NO FEDERAL QUESTION IS INVOLVED.

The Vermont Public Service Commission exists only by virtue of local statutory law and its jurisdiction may be limited in any way which does not conflict with the Federal Power Act. The requirement of a license from the Federal Power Commission in appropriate cases by Vermont law, 30 V.S.A. §111, (R. 144a) is wholly consistent with the Federal Power Act. Therefore, since it is established that Clyde River is navigable, the question of whether the petitioner could condemn in a state tribunal without a license is a question of state law, and in no sense a federal question.

## ARGUMENT

### I.

### IN THE ABSENCE OF A LICENSE FROM THE FEDERAL POWER COMMISSION, THE VERMONT PUBLIC SERVICE COMMISSION HAD NO JURISDICTION OF THE EMINENT DOMAIN PROCEEDINGS INSTITUTED BY PETITIONER IN CONNECTION WITH A PROJECT INVOLVING NAVIGABLE WATERS.

**A. Such is the law of Vermont as established by judicial decisions.**

*Citizens Utilities Company* v. *Prouty* (R. 149a);

In *Bellows Falls Hydro-Electric Corp.*, 114 Vt. 443, 47 A. 2nd 409 (1946) as in the present case, there was no question about the navigability of the Connecticut River, of which fact the Vermont Court had taken judicial notice prior to the enactment of the Federal Power Act..

*Boutwell* v. *Champlain Realty Co.*, *supra*, at 89 Vt. 86.

There the Vermont Supreme Court, wholly on its own initiative and without any suggestion from the parties or their counsel, took judicial notice of the long recognized and notorious navigability of the Connecticut River and determined that the Public Service Commission could have no jurisdiction whatever to issue a certificate of public good with respect to a power project on a navigable river.

Thus in Bellows Falls the Court said:

"While none of the briefs filed in this case makes any mention of the provisions of the Federal Power Act, 16 U.S.C.A. §791a et seq., yet this Court is bound to take judicial notice of all provisions of that Act which apply to the subject matter of the petition. *Bouchard* v. *Central Vt. Ry. Co.*, 87 Vt. 399, 401, 89 A 475, LRA 1915 C 33. Section 23 (b) of that Act states as follows:

"'It shall be unlawful for any person, State or municipality, for the purpose of developing electric power, to construct, operate or maintain any dam, across, along, or in any of the navigable waters of the United States, . . . except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. . . .'"

The Vermont Court then decided upon the authority of the Iowa Case, *First Hydro-Electric* v. *F. P. C.* 328 U. S. 152, 90 L. ed. 1143, that the Public Service Commission was

without authority in law to entertain the petition, in other words, without jurisdiction. It quoted from the First Iowa Case to the effect that "the detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls."

Thus, without undertaking to over rule both *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission* and the Vermont Supreme Court in the Bellows Falls case and in *Citizens Utilities Company* v. *Prouty* (R. 119a, at 129a-131a) as well, the District Court and the Circuit Court of Appeals were required to hold that the Public Service Commission of Vermont did not have jurisdiction of the eminent domain proceedings instituted by Citizens Utilities Company. Petitioner cannot point out any statement in the opinion of the Vermont Supreme Court (R. 119a) that the State Public Service Commission had jurisdiction of Citizens' petition at any time.

That the opinion does not lend the slightest support to such a conclusion, so inconsistent with established law, is clear from its more positive and direct reasoning, thus:

> "The Public Service Commission decided that the petition before it, which asks for the condemnation of land between a power plant and a dam, and over which land penstocks carry water from dam to powerhouse, was governed by the provisions of 30 V.S.A. §111(1)."
>
> "We therefore agree with the Public Service Commission that the dam and powerhouse with which this land is associated must be authorized under Section III (1) of 30 V.S.A." (R. 123a).
>
> * * * * * * * * *
>
> "A private corporation has no right to eminent domain in the absence of a delegation of such power to it from the sovereign by virtue of constitutional or statutory provisions. 29 C.J.S. Eminent Domain, p. 12 See *George* v. *Consolidated Lighting Co.*, 87 Vt. 411. The statutory provision of 30 V.S.A. §111(1) grants the right of eminent domain to a private corporation before the

Public Service Commission provided that such corporation has a certificate of public good from the State, or a license from the Federal Power Commission." (R. 128a)

* * * * * * * * *

"It must therefore follow that it is without jurisdiction to exercise the power of eminent domain by virtue of a certificate of public good, for the power of eminent domain is subordinate to, and dependent upon, the license to maintain the facility for which the land sought is to be condemend."

That the Federal Power Act has taken away from the states the power of control over navigable and other waters subject to the power of Congress is clear from the language of the act itself, its history and judicial interpretation.

With the enactment of the Water Power Act, 16 USCA §791, June 10, 1920, the Congress entrusted and delegated to the Federal Power Commission its constitutional power of control over all navigable waters capable of use for interstate and foreign commerce and the tributary waters and streams, the use, operation or control of which could affect the interests of interstate or foreign commerce.

*First Iowa Hydro-Electric Co-op.* v. *Federal Power Commission, supra.*

*Tuscarora Nation* v. *Power Authority of State of New York*, 257 F. 2nd, 885, 894, Cert. Den. 358 U.S. 841, 3 L. ed. 2nd 76, 79 S. Ct. 66, rehearing denied 360 U.S. 923, 3 L. ed. 2nd 1538;

*United States* v. *Appalachian Electric Power Company*, 311 U.S. 377, 424-428, 85 L. ed. 243;

The Clyde River then was, just as it is today and ever since has been, such a tributary. There has been no change in that respect since 1920. It is the same river in every way, a principal tributary of Lake Memphremagog, an international body of recognized navigable water.

Important for consideration here are certain consequences of the Federal Power Act. Certainly no state legislature can pass valid laws nullifying or inconsistent with any part of the Federal Power Act. State courts and administrative tribunals are bound to respect and give effect to its provisions. It is a part of the Supreme Law of the Land. U.S. Constitution Article VI, §2.

By it Congress bestowed upon licensees of the Federal Power Commission and upon licensees alone, the privilege of exercising the sovereign power of eminent domain either in the federal district courts or in the state courts.

16 U.S.C.A. §814;
*Tuscarora Nation of Indians* v. *Power Authority of State of N. Y., supra;*
*State of Missouri ex rel Camdem County* v. *Union Elec. Light & Power Co.*, 42 F. 2nd 692, 698.

Another provision of the Federal Power Act §23, 16 USCA §817 (R. 142a) made it unlawful, for the purpose of developing electric power, to operate or maintain any dam, water conduit, power house or other works incidental thereto across, along, or in any of the navigable waters of the United States without a license granted pursuant to the Act, and authorized the construction of such project works in compliance with state laws, *only* upon a failure by the Federal Power Commission after due hearing to find that the interests of interstate or foreign commerce would be affected. Otherwise construction, maintenance or operation of such dam or other project works is prohibited without a license.

That Congress has pre-empted the entire regulatory field and has granted exclusive power to the Federal Power Commission over navigable waters is clear from the Federal Power Act as a whole and emphatically demonstrated by the following sections of that Act: 16 U.S.C.A. §§796, 797 (e), 803, 804, 814, 817.

The saving clause at the very end of §23 of the Federal Power Act, 16 U.S.C.A. 817, even more than §27, 16 U.S.C.A. §821, shows that state laws and state jurisdiction are super-

seded unless specifically protected from supersedure by particular exceptions in the act itself.

*First Iowa Hydro-Electric Coop.* v. *Federal Power Commission, supra.*

Section 23 is therefore "thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that in those fields where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course."

Id. 176.

"The detailed provisions of the Act providing for the federal plan of regulation, leave no room or need for conflicting state controls."

Id. 181.

By its finding that the Respondents' land is situated upon a navigable stream, the Vermont Supreme Court necessarily decided that any authorization for the maintenance and operation of the project is within the exclusive jurisdiction of the Federal Power Commission.

*Federal Power Commission* v. *Oregon*, 349 U.S. 435, 446, 99 L. Ed. 1215;

The eminent domain petition was for this very reason outside the jurisdiction of the Vermont Public Service Commission at the time of its filing.

Pre-emption of the field of control over navigable waters and their tributaries by Congress has suspended the power of state tribunals and a state administrative board does not have any jurisdiction even though the particular matter sought to be administered by the state board has not been taken up by the Federal Agency.

*La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board*, Wis., 336 U.S. 18, 24, 26, 93 L. Ed. 463;

*Bethlehem Steel Co.* v. *New York State Labor Relations Board*, N. Y., 330 U.S. 767, 773, 776, 91 L. Ed. 1234;

*Oregon-Washington RR. & Navigation Company* v. *State of Washington*, 270 U.S. 87, 102, 70 L. Ed. 482;

*Hood & Sons* v. *DuMond*, 336 U.S. 525, 543-545;

*State Board of Ins.* v. *Todd Ship Yards Corp.*, 370 U.S. 451, 456, 8 L. Ed. 2nd 620;

The foregoing principles and the holding of the Vermont Supreme Court that the State Commission had no jurisdiction of the eminent domain proceedings because the petitioner possessed no license, certificate of public good or other authorization entitling it to proceed, are by no means novel.

The rule that there can be no condemnation involving federal waters without the consent of Congress is older than the Federal Power Act itself.

*Minnesota Canal & Power Company* v. *Pratt*, 101 Minn. 197, 112 N. W. 395.

That was a condemnation case. It was there held under Section 9 of the Rivers and Harbors Act, now 33 U.S. Code §401, that a public service corporation cannot exercise the power of eminent domain in furtherance of an enterprise affecting navigable waters, without first having obtained the approval of the Federal Government.

It therefore follows that no tribunal either federal or state has any jurisdiction to further by eminent domain proceedings the maintenance and operation of a project forbidden by §23 of the Federal Power Act, 16 U.S.C.A. §817. Moreover, the power of eminent domain is granted only to licensees. 16 U.S.C.A. §814.

Hence, the courts below were required to hold the Vermont Public Service Commission never had jurisdiction

of the eminent domain proceedings for the reason that the Petitioner lacked the requisite federal license.

> *Niagara Falls Power Company* v. *Federal Power Commission*, 137 Fed. 2d 787, 791, certiorari denied, 320 U.S. 815.

There, the Power Company relied upon the fact that at the time it applied for a federal license, it already had a permit issued by the State of New York. L. Hand, Judge, rejected this contention and held that no prescription could run against the United States and that the State's permit being beyond its power did not give the Company any right to seize upon the energy of the nation's streams, or to impair their navigability.

Judge Hand remarked—"It would have been a groundless compunction which should have protected 'permits,' 'rights of way,' or 'authority' granted by municipalities or states." * * * "What equitable claim then has a company which relies upon the grant by a state of something beyond its power? What standing does a state's license give it to seize upon the energy of the nation's streams or to impair their navigability?"

There is much more authority in addition to the statute, 16 USCA §814, demonstrating the necessity for a license.

> "Authorization of this project, therefore, is within the exclusive jurisdiction of the Federal Power Commission, unless that jurisdiction is modified by other federal legislation."
>
> *Federal Power Commission* v. *State of Oregon*, 349 U.S. 435, 445, 99 L. ed. 1215.

> " 'The licensee by virtue of section 814 becomes vested with the governmental power of eminent domain.' "
>
> *Tuscarora Nation* v. *Power Authority of State of New York*, 257 F. 2nd. 885, 894, cert. den.

358 U.S. 841, 3 L. Ed. 2nd 76, 79 S. Ct. 66, rehearing denied 360 U.S. 923, 3 L. ed. 2nd 1538, 79 S. Ct. 1431.

". . . a license is a pre-requisite in that water rights under state law in a navigable stream may not be exercised without one; . . ."

*Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 202 F. 2nd, 190 at 207, affirmed 347 U.S. 239, 98 L. ed. 666, 74 S. Ct. 487.

"Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license."

*United States* v. *Appalachian Electric Power Company*, 311 U.S. 377, 424, 85 L. ed. 243, 61 S. Ct. 291.

None but licensees are authorized by §21 of the Federal Power Act to exercise the right of eminent domain.

16 USCA §814.

The Federal Power Act applies to dams constructed before its passage. It was so held in *Wisconsin Public Service Commission* v. *Federal Power Commission*, 147 F. 2d 743. There "the utility corporation makes the point that since authority to construct and maintain the dam had been granted by the State of Wisconsin, it constituted a permit for the reconstruction of the dam and the Commission was without power to require the corporation to take out a license under the Federal Power Act." This contention was rejected by the Court because to accept it would be to disregard the plain language of Section 23 of the Act, 16 U.S.C. §817.

**B. Applicable statutes of Vermont deprived the Public Service Commission of Jurisdiction over Citizens' Petition because petitioner lacked any authority to condemn.**

The statutes, to this effect and upon which the Vermont Supreme Court (R. 123a; 130a) in *Citizens Utilities Company v. Prouty et al*, the District Court (R. 81a) and the Circuit Court of Appeals (Appx A 7a) all relied, are set forth in the various appendices of the parties, especially 30 V.S.A. §111(1), formerly Section 9333 of the Vermont Statutes of 1947 (R. 144a) and 30 V.S.A. §115. (Rs' Appx. 7a).

The jurisdictional basis for action by the State Commission was absent because of the petitioner's failure to invoke and secure the necessary authority. The statutory law cannot be avoided or dispensed with by contract and the courts are bound to see that it is observed before private property is taken by eminent domain.

Thus, the opinion of the Vermont Supreme Court in *Citizens Utilities Company v. Prouty, et al*, said:

> "The report also states that the petitioner does not have the license under the Federal Power Act which it was ordered to obtain by the Federal authorities." (R. 123a)

> "The Petitioner has no certificate of public good in the instant case, * * *" (R. 124a)

These facts are beyond dispute. At the same time, Citizens Utilities Company has strenuously, albeit unsuccessfully, resisted the requirements of the Federal Power Act and all efforts of the Federal Power Commission to secure compliance. (R. 81a; Rs' Appx. 6a).

Yet, the navigability of the Clyde River has been an established fact from earliest times. (Appendix B, 17a-18a).

Of particular importance here is the fact that the War Department reported to the House of Representatives in April, 1826, on the feasibility of improving the Clyde River as part of a proposed waterway development extending from Lake Memphremagog to the Connecticut River.

## II.

## PETITIONER'S REASONS FOR GRANTING WRIT ARE NOT VALID.

**1. There has been no retro-active application of any order of the Federal Power Commission.**

Neither the Circuit Court of Appeals, the District Court nor the Vermont Supreme Court in *Citizens* v. *Prouty* has made any decision giving retro-active effect to the assumption of jurisdiction by the Federal Power Commission. There is no statement in the opinion of any one of these courts that they are applying the Federal Power Commission order retroactively. Construed as a whole, none of the opinions purport so to do. The adverb "retroactively" which is employed by Petitioner to set up a false premise is significant only because of its complete absence from the opinions of these courts. Moreover, the fact of navigability is the basis of the decision of the Vermont Supreme Court, for it said:

> "In the instant cases the facility of the private corporation for which land is sought to be obtained by eminent domain is upon a navigable stream." (R. 129a).

This determination is res adjudicata. Hence, the rationale of the Circuit Court of Appeals is that under Vermont law the Public Service Commission did not have jurisdiction in 1956 for the reason that the project in question was situated upon navigable waters of the United States.

Petitioner argues that the State Public Service Commission once had jurisdiction and "retained" it until the Federal Power Commission acted to assert its own jurisdiction. In other words, Petitioner says the state commission had jurisdiction until lost by the happening of a condition subsequent, namely, assumption of jurisdiction upon the part of the Federal Power Commission. The fallacy of this proposition is of course obvious from the language of

§23 which gives permission to proceed upon compliance with state laws, though only when the Federal Power Commission after hearing does not find that the interests of interstate or foreign commerce would be affected. Otherwise, Citizens "*shall not construct, maintain or operate such dam or other project works until it shall have applied for and received a license* under the provisions of this chapter." (Italics Supplied).

16 U. S. C. A. §817.

Decisive, however, is the fact of navigability determined by the Vermont Supreme Court. It leaves no room for the exercise of any state authority, because the federal law and the jurisdiction of the Federal Power Commission occupy the entire field, unless permission is granted pursuant to Section 23 of the Federal Power Act, 16 U.S.C.A. §817, to proceed upon compliance with state laws. Otherwise, by the first sentence of Section 23, it is unlawful to operate or maintain any dam, water conduit, power house or other project works across, along or in any of the navigable waters of the United States.

The importance of the prohibitions contained in §23 of the Federal Power Act has been twice recognized and emphasized by the Vermont Supreme Court. (R. 125a; 129a)

In re Bellows Falls Hydro-Electric Corp., *supra*.

**2. The second question of the Petition is based on the utterly false premise that the highest court of the forum state said that jurisdiction in the Public Service Commission "was once present."**

There is no such statement in the opinion of the Vermont Supreme Court and no such notion is implied.

**3. The argument that a state agency, which decrees condemnation, and a utility, which acquires property rights thereby, act completely at their peril is absurd.**

Citizens Utilities Company, as the opinion of the Circuit Court of Appeals points out (Petitioner's Appendix 7a), could not have been blind to its obligations under §23 of the Federal Power Act, 16 U.S.C.A. §817.

Moreover, as the Circuit Court of Appeals well said (Petitioner's Appendix 7a) "The decision in re Bellows Falls Hydro-Electric Corp., *supra*, had been upon the books for some years."

It also was bound to know the statutory law of Vermont which in case of riparian property of the nature here involved required that the petitioner in condemnation proceedings possess either "a certificate of public good authorizing the project as herein required, or a license from the Federal Power Commission." (R. 144a).

30 V. S. A. §§111 and 115.

Thus, the answer to petitioner's contention about "the existence and scope of a state's power of eminent domain over land abutting possibly navigable waters, prior to any determination of navigability by the Federal Power Commission," is that the petitioner has not proceeded in accordance with state law and is in no position to raise the question, now that its proceedings in the state tribunals have been definitely terminated and dismissed.

No property rights of petitioner are at stake. The question is moot. On the other hand, the property of respondents ought to be protected against unauthorized appropriation contrary to state law. (R. 128a).

*George* v. *Consolidated Lighting Co.*, 87 Vt. 411, 89 A. 635.

**4. Petitioner's contentions based on Grand River Dam Authority v. Grand-Hydro, 335 U. S. 359 are unsound:**

That proceeding involved only issues of valuation which were held to have been properly decided in accordance with state law under the particular circumstances of that case. No question or issue of jurisdiction was raised or presented

in any way, as petitioner freely admits. At any rate, the petitioner in Grand River had filed with the Federal Power Commission a declaration of intenton December 15, 1937, (more than a year previous to instituting condemnation proceedings in February 1939) and evidently applied for a license from the Federal Power Commission as a result of that Commission's decision dated February 28, 1939, which however was not granted until July 26, 1939; quite a contrast with the conduct of the petitioner here, Citizens Utilities Company. At any rate, petitioner is relying upon a very slender reed when it designates a point not raised in Grand River as a "teaching" to be absorbed by this court.

Reference in the context of this case to *Yoder* v. *Nu-Enamel Corp.*, 117 F. 2d 188, 189, lends no support to the contentions of the petitioner. The local law in question is embodied in the Vermont Statutes and the decisions of the Vermont Supreme Court. It is local law of that quality which should be followed upon the authority of *Yoder* v. *Nu-Enamel*, and not an irrelevant *dictum*.

## CONCLUSION

The petition should be denied, because the Vermont Public Service Commission, by state statute and judicial decision, had no jurisdiction of condemnation proceedings involving riparian lands situate upon navigable waters of the United States, when brought by a petitioner lacking a license from the Federal Power Commission, and, hence, without the right to institute such proceedings given by §21 of the Federal Power Act, 16 U.S.C.A. §814, to licensees and to licensees alone.

Certainly this case is not "of such imperative public importance as to justify deviation from normal appellate processes and to require immediate settlement in this court" as required by United States Supreme Court Rule #20.

Respectfully submitted,

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